

## A SCOTTISH JUDGE ORDINAR.\*

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*(Continued from the January issue.)*

To the judicial duties of the "Judge Ordinar," various administrative duties have from time to time been added. It has long been the custom of Parliament, whenever something of that kind has had to be done and there was nobody in particular to do it, to pitch the duty upon the shoulders of the principal resident magistrate. For instance, he was made a member and virtually the legal adviser of the old county board which preceded the present county councils. In connection with the boroughs he had, if they were extended, to fix their boundaries and also some other duties. He had also duties in connection with the election of members of Parliament, and I recollect being somewhat surprised at being told in an election it was in my power to take the vote at any of the polling places and charge the candidate a fee. The notion amused me and I went, though I omitted to charge the fee. The voting was taken openly—it was long before the days of ballot—and occasionally I got a little amusement. I remember, towards the close of the day, hearing a discussion outside the very thin walls of the place, which was by no means intended for me. Two men came up, eagerly arguing whether the liberal candidate was sure to get in. One who had voted assured the other that it was a matter of absolute certainty. The reply was: "Well, then, I will go in and vote for the Tory and please the factor."

The rights of appeal, as I have said, were numerous. When I first became a local judge, there were no fewer than four appellate instances. The first instance was of a curious kind. It was optional and was to an official usually a practising barrister, called the "Sheriff," but who in older times had been called "Sheriff Depute," a name not to be forgotten by one who wants to understand the history of the Courts. He was a sort of intermediate official, half way between judge and barrister, and half way between the Supreme and the local courts, and, so far as I know, peculiar to Scotland.

The next appeal, when I began, was to a "Lord Ordinary," a name of much the same origin as the "Judge Ordinar." He was one of the judges of the Supreme Court and sat alone. This right

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\*Professor Wilson died in San Remo, Italy, January 24, 1908.—[ED.]

of appeal has, with one or two exceptions, been abolished, and the first appeal to the court of session now is to one of its divisions composed usually of four judges. A still further appeal to the House of Lords is allowed upon points of law.

When the Supreme Court of Scotland was remodeled in the sixteenth century, no regulation was made as to the power of appeal and the judges naturally took the simplest plan and laid down that there was always to be an appeal unless when they or the legislature had expressly forbidden it. In this way, rights of appeal were numerous. Attempts have been made frequently to restrict the power as in the case of most other courts to final judgments, but these have not been successful. The "Judge Ordinar" has no ground to complain of the number of the appeals. They afford him a splendid point of view for judging of the way in which courts work and of the state of the law. Reversals were and are very numerous. The courts of session throw over the decisions of the "Lords Ordinary" and the local judges as fast as may be, and then, when their own decisions go to the House of Lords, one after another fails. This is inevitable, owing to the vagueness of the law. It is sometimes thought that judges are disturbed when their decisions are reversed. This may be true of inexperienced judges, but not generally, for when a man has carefully studied a decision and given his opinion, he comes to have an incapacity for fairly appreciating an opposite opinion. I scarcely ever knew a judge of a lower rank who was disturbed about his judgment having been reversed. He was invariably persuaded that the opposite judgment was a mistake. As a general rule, he would be prepared to admit that he was liable to error. If of a mathematical turn of mind, he would be sensible that he had a personal equation of error, but a man seems, by the mere act of carefully deciding a case, to become incapable of changing his view. I recollect a judge of the court of session speaking of a "Lord Ordinary's" judgment having been returned to by the House of Lords, and of his being amused at the "Lord Ordinary" being proud of it as if, "Bless me, that was not a thing which might happen to anybody." The fact is, that reversing a judgment seldom shakes the opinion of the lower judge, while adhering to it occasionally makes him doubtful. This attitude of the lower judge I felt was unwholesome. So much so that I thought it better to read as little as possible of the judgments on appeal, whether adhering or reversing. For the last twenty or twenty-five years of my office I hardly ever read the judgments under the optional appeal. It was unnecessary for me to do so, because another of the anomalies connected with them was that they were

not binding on me as precedents. The judgments of the higher courts I carefully read and noted, because they were binding on me for future guidance.

The law which I had to administer was an illustration of the saying that "there is nothing so ordinary as the extraordinary." It had lasted at least eight centuries without any attempt to merge its various elements into a harmonious whole. Its substance left a great deal to be desired in many matters, particularly in family law and succession. In point of form—with the doubtful exception of the English—it was the worst law of any of the white races. In form, if it could be said to have one, it was Sporadic. It lay as it had chanced to grow; where the shoe pinched, it had been cobbled, and law reformers had confined themselves to work of that humble kind. Compared with the law of the other countries of Europe, such as France and the Latin countries, or with Germany, where systematic codes, clearly defined and well considered, had been framed, or were in course of framing, it was rudeness itself. Compared with America or with the colonies, it was far behind. In America, there had been a good deal of codification, and both in it and in the colonies consolidation of statutes has done much to simplify. Compared with India, where compact codes rule most cases, it is far behind. Scottish Law is still distinctly separate from English. After a union of the crowns for three, and of the legislatures for two hundred years, it was to be expected that the laws of the two countries would be the same. And clearly they ought to be the same, because it is absurd that a small country like Scotland, so intimately connected with a large country like England, should still keep its own law, and uniformity should extend, not only over the United Kingdom, but over the British Empire. There is, indeed, a gradual process of assimilation going on between English and Scotch Law, but the remedy seems almost worse than the disease. Amending statutes are brought in from time to time, often containing English ideas. When cases go to the House of Lords, it is inevitable that the judges, who are mostly English, should look at things through English spectacles, and have a tendency to make the Scotch rules tally with their own. This mode of assimilation tends merely to keep Scottish Law uncertain, and is so slow that he would be a bold man who ventured to prophesy the number of centuries in which it is likely to be completed. The principle that uniformity can be got only through codification has only recently been recognized in the United Kingdom.

The state of the form of Scottish Law is truly remarkable. To get to the root of it, you have to go to the laws of the nations, who

were here before the country was consolidated into a kingdom. During this period, two systems of law prevailed—the Celtic and the Anglo-Saxon. I believe I was the first to point out that nothing of the Celtic system now survives in the living law. Of Anglo-Saxon Law, there are endless survivals, but so overlaid with laws of subsequent importation that they are difficult to recognize. For about four centuries after the consolidation of Scotland into a kingdom, we had the feudal or Scots-Norman Law, which has left its roots deep in our most complicated system of property in immovables. Then, for three centuries, we had the Roman Law, adopted from continental examples, as the dominant system ruling almost the whole law of contract and of property in movables. To these elements, you have to add some centuries of native statutes, only now partially purged of effete matter and still sadly wanting consolidation. To increase the confusion, the growing quantity of reported decisions has to be regarded. They are even more numerous than those with which our English and American friends have to grapple, for we have not only our own cases to consider, but we never know when we may not also have one of their cases to take into account. This grievance is not, however, so great as it seems. The great bulk of the cases which are cited in the courts are simply those of the last ten years, or at most, those within the memory of living lawyers. What makes the cases so difficult to consult is the practice that has grown up within recent years of the judges carefully avoiding the statement of general principles. The fear of being criticised is so great that nothing is laid down except the merest minimum of law sufficient for the judgment of the particular case. For the intelligent administration of this law, as I found it, a large library of Scottish, English, and Foreign law books was necessary, and one of my first cares was to lay the foundations of such a library, and in time it became one of the best private law libraries in Scotland.

The question, Who is to blame for the state of Scottish law? is only one of speculative interest. Both England and Scotland have blame, but possibly the predominant partner deserves the bigger share. It is impossible for Scotland now to codify its own law; it is England that must begin. Possibly, once upon a time, Scotland might have codified, and in the days of the prevalence of Roman Law, things looked somewhat as if we were going to follow the examples of the continental nations, but since Roman Law has practically been killed, codification over the United Kingdom is the only remedy.

The specific causes which prevent codification in the United Kingdom are obvious, and I mention them briefly in the order of importance. There is, firstly, the indifference of the general public; secondly, the incapacity of the Legislature; and thirdly, the hostility of the legal profession.

The indifference of the public is due to the nature of the British people, probably the most conservative in the world, and certainly the most self-complacent. The conservatism of the English section in particular is extraordinary. They may be progressive in making conquests and colonizing, in the carrying trade and in commercial enterprise, but outside of these things they are stationary. Still to the amusement of foreign countries we retain our mediæval system of money and measures. To their astonishment, also, we have not yet attained to the separation of the judicial and legislative functions. None outside of the United Kingdom can understand why so simple a matter as the registration of titles to immovables is practically unknown in England. This conservative feeling is increased by the insular pride of the English, which, except among the men of science and of the scientific professions, is intense. With others, no stronger argument can be used against a change\*than to say that it is un-English. The English have hardly a notion of attaining uniformity except by domineering. If another nation likes to adopt an English system *verbatim et litteratim*, it can do so and welcome, but as to changing one item of their system to make it acceptable, that is out of the question. The treatment of Ireland is a striking and unfortunate instance. It is some fifteen centuries since the first Anglo-Saxons landed in England, and the feeling of enmity between Saxon and Celt is as great now as it was then. On the English side there is contempt; on the Irish side there is hatred; both bitter as ever.

With the British public it is impossible to avoid the feeling that there is also an objection to codification of an even more discreditable kind. Uncodified law is incredibly expensive to work. The amount of this expense is a carefully guarded secret of the profession. You may study the judicial statistics and the reports for years without obtaining the slightest idea of it. Now and then in bankruptcy cases when you hear of such things as an appeal costing £10,000, or the divorce of a clergyman of small means running to the figure of £7,000, a glimpse is got of the truth. The richer classes which have been the more influential care nothing. It is their pride to be able to pay, and they do not mind paying largely. The classes that are not so well off hardly complain and often protect themselves otherwise. They get over the difficulty sometimes

by not going to law except in bodies. Merchants and business men take care in all their contracts to exclude by reference clauses the jurisdiction of the courts.

Lastly, the indifference of the public is explained by the fact that they take no interest in the law, and know next to nothing of it. If you speak to an Englishman or a Scotsman, you may assume that he knows nothing whatever about it. Every foreigner knows a good deal about his law, and has the means of getting further knowledge at every turn, while a British subject knows nothing, even of the simplest matters. He does not even know how, if he omits to make a will, the law will divide his property at death. He does not even know what rights his wife or his children have. The Britisher takes a pride in leaving all that to his lawyers, and no statesman or voter ever thinks of mentioning the subject.

The worst of this indifference is that the public could easily get improvement if it liked. When the public puts its foot down, it gets what it wants. At one time the delays in the law were something appalling, but the public declared for expedition and the Civil Procedure Acts, largely borrowed from American examples, were passed, and in England cases are now decided in all the courts with an expedition which the courts of no other nation can rival. The merchants at one time showed an inclination to get a Code of Mercantile Law, and with the help of the late Lord Herschell, they got some instalments of it. But their interest in the matter soon expired and for the last twenty years or so little or nothing has been done for them.

The incapacity of the Legislature is both individual and collective. The individual members of the Legislature may be either politicians of the ordinary type or they may be lawyers. The ordinary politicians, even the more distinguished of them who rank as statesmen, as a rule, care absolutely nothing for law reform. They seem quite ignorant of the vast progress that had been made elsewhere within recent years and they do not care to take the initiative in matters in which their constituents are not interested. Even one of the most distinguished of recent politicians, Mr. Gladstone, who had tried every side of politics, and had spoken on every public question, never once so far as I know, said a word in favor of law reform.

Of the legal members of Parliament, there are plenty with the requisite knowledge and ability, but for another reason they remain uninterested. Legal members go into Parliament on the hunt for promotion and nothing is more fatal to that than the notion of being a law reformer, since the solicitors, who have the patronage of business, are uniformly and bitterly opposed to all law reform, and in

particular, to codification and all heresies which interfere with profits.

Collectively, the system in Parliament is unfavorable. There is no rational system of devolution of duties. The only devolution ever contemplated is the dividing of Parliament into several minor Parliaments, distributed according to territory, which could give no help to the work, but would simply require the work to be done as often as there were divisions. Of devolution by which work is facilitated, there is scarcely any. There is an excellent drafting department, but it is powerless. There are committees, including one upon law, but no responsibility is left to them. According to a system which has prevailed since the work of Parliament was small, every individual member is entitled to have his say upon every question, and one member, if he be only sufficiently impervious, can stop almost any bill he pleases. Thus one member who is a retired solicitor and sits for an island constituency, has been able for years to prevent the Marine Insurance Code from passing. Recently he was pacified by some minor appointment and he graciously withdrew his opposition. The hostility of the legal profession to codification is becoming modified, especially in the upper ranks. Many of the judges and of the leading barristers are now sensible of the benefits it would bring, but it is seldom that a lawyer takes any interest in the question till he has become independent of practice and indifferent to promotion, and even then he is frequently restrained from active help, partly by age and partly by a sentimental reluctance to kick down the ladder by which he has risen.

Such being the office that I was to hold, and such the law that I was to administer, I set out in December, 1861, for my new district. I did not get the whole of it at one time. At first I merely got the Southern portion of it, the old Earldom, or, as some say, Kingdom of Kincardine or the Mearns, and it was a few years before there was added to it the Northern portion formed of the county of Aberdeen made up of the old earldom of Mar and Buchan and of several minor earldoms. There was no essential difference between the two portions. The united district extended over the northeast corner of lowland Scotland. From the broad valley of Strathmore, in the South, it extended to the Moray Firth in the North. Along the rocky coast of the German Ocean there stretched an irregular rough plain, almost all of arable land. The Western side of this plain was bounded by outlying portions of the Grampians, and had once been within the Highland line. The district was almost conterminous with one of the great divisions into which naturalists divide Scotland. In pre-historic times, as

the place names and the remains found in the mosses show, it had been well wooded with oak and beech, but by the eighteenth century, the wood had disappeared, and a country more bleak and bare could hardly be conceived. By the middle of that century, planting, chiefly of various kinds of pine, began on a large scale and on the lower hills there are now extensive forests. There is little of natural wood, except a few birches and alders on the river-banks. On the lower plain there are occasional plantations of the finer kinds of wood round the mansions of the landed proprietors. Of wild birds and animals there was endless variety. On the high hills the eagle and the raven are only recently extinct. Ptarmigan, grouse and black game are plentiful. About the rivers the curlew and the lovely oyster catcher are to be seen in plenty, and there are some three kinds of plover, besides the water ousel and others. Of water fowl, the teal, various kinds of duck, and the coot are in profusion. On the low ground, all the usual kinds of game birds are found. The wild swan and flocks of wild geese are occasionally to be seen about the mouths of the rivers, and on the cliffs which overhang the ocean, myriads of gulls, kitty-wakes, tern, skua and all sorts of sea fowl are seen. Of animals, the badger and the polecat are recently extinct, but the white hare and the stoat or ermine are still numerous. The otter in the rivers and the seal on the coasts are to be seen, though sadly persecuted by the salmon fishers. The red deer and the roe are plentiful, though the former would probably disappear were it not carefully protected. On the low grounds brown hare are plentiful and it requires careful thinning to keep the rabbit from becoming a nuisance. The squirrel, though only a recent importation from the South, has become too plentiful for the good of the trees. The rivers and lakes swarm with fish of all ordinary kinds,—salmon, trout, pike, and perch. Altogether, for a sportsman with moderate tastes, there was no finer country than the one to which I was sent. It was hardly a picturesque country, although it had picturesque cliffs and valleys, studded with ancient castles almost all in ruins. Numerous earth works took one back to an older civilization, and many a sculptured stone and druid circle told of times pre-historic, and everywhere song or legend perpetuated the memory of every feud that had rent the country from the time of Macbeth to the Jacobite Rebellions.

In the hill districts the Celtic language, once common, had died out. It lasted to the middle of last century in one or two spots, but when I went to the district in 1861 I do not think there was a native-speaking Celt left. On holidays, there were a good many who masqueraded in the highland costume, but of really highland clans there



was only one left, the Farquharson. The other Celts had merged with the Teutonic settlers,—the Norse and the Angles, who, in the time of the migrations, had come from Scandinavia and North Germany, and in the Middle Ages had fallen, for the most part, under Norman leadership. The Scottish dialect was spoken over the whole district, but that dialect has nothing of Celtic except the name. It is simply the North Anglian dialect spoken from the Humber to the Moray Firth, one of the purest Teutonic dialects in the United Kingdom.

The population contained the usual elements. There were the Peers reminding one in their old fashions of the novels of Walter Scott and George Macdonald. Then there was the lesser gentry, some of whom had repaired their fortunes in the East and West Indies. Many of the old families had died out and their places were filled by men who had grown rich in trade. There was a numerous middle class of clergy, medical men, lawyers and farmers. Then there was the laboring class which consisted of three main ingredients. There were shepherds who lived amongst the hills; there was the agricultural class, and then the fishermen, all differing widely from each other. I am not mentioning the town populations, because the progress of civilization had made them exactly alike. The country population was, on the whole, orderly and industrious. The principal faults were the extent of illegitimacy and drunkenness.

The illegitimacy gave a good deal of work to me and the other lawyers, *la recherche de la paternité* being permitted in the local courts for the purpose of compelling the parents to maintain their offspring. The evil of the amount of illegitimacy was one deeply rooted and of old standing. The rate, about ten per cent of the births, was much higher than in England, and, though hardly the highest in Scotland, was much above the average. The town populations were better than the country, but that was from causes which no way tended to promote morality. The worst sinners were the lowest class of agricultural laborers. The usual explanations were unsatisfactory enough. To blame the general coarseness of manners was not to explain the evil, but to throw its origin a stage farther back. The coarseness of the manners and customs was, indeed, so bad, that any one who became acquainted with them as I necessarily did, was astonished rather at the smallness than the largeness of the illegitimacy rate. Deficiency in secular or religious education could not be the cause as the education of both kinds was among the best in Scotland, and Scotland is the best educated part of the United Kingdom. The house accommodation has been

blamed, but there are parts of Scotland where the accommodation is infinitely worse and yet the morals greatly better. The Bothy and Farm Kitchen System have also been blamed, and yet they are in no wise peculiar to the affected districts. The worst of the evil is that it is thought nothing of. The having had one or two illegitimate children does not prevent a woman making a good marriage to somebody she has not known before it; after marriage misbehavior is unknown. A visitor will go into a farm cottage and will see three children playing. The "house mistress," without a blush, will explain that one of them is "his," meaning her husband's before marriage; that another is "mine," meaning her own before marriage, and that a third is "ours," meaning their joint production, and the visitor, if a native, will find it all quite natural. The large "Statistical account of Scotland," which was written by the parish ministers, affords an illustration to the point. The volumes for Aberdeen and Kincardine contain many a disquisition against the drinking habits of the people, but not a word of censure on their amorous propensities. The fisher people are better than the agricultural, the worst fault with them being that the clergyman had often to come back for the first baptism too soon after the marriage, but upon this nobody would be ill-natured enough to make an observation. And though statistics are wanting, things seem to have been no better long ago. I think the cause must be racial. There is little Celtic blood in the district, and a great deal of Norse, and if any one will take the trouble to compare the figures for purely Celtic nations or districts with the figures for purely Norse districts, he will be struck with the difference.

Drunkenness was, and is pretty bad. I do not think it is worse than it used to be long ago, but from anything I can discover, it is not much better. It was by no means unknown if one asked the character of a man to find him described as a nice man when he was sober, but as being hardly ever sober. What caused the extensive conviviality, it is difficult to know. If there is any deterioration, I think it is due more to ill-judged interference by the legislature and the middle classes than to any fault of the lower. Interference by the legislature changed the drink of the country people from French wine and home-made beer to whisky. Spirit drinking has brought its usual concomitants of the dipsomaniac and the prohibitionist. Both the upper and lower middle classes, especially the latter, have been pervaded with the idea that police restrictions will effectually cure the evil, and in particular, that if you only diminish the number of houses where drink is sold and restrict the hours of sale, you will diminish the amount of drinking. This has been tried on a

large scale, but the classes experimented upon seem no better. On the contrary, it seems to me that the amount of home and secret drinking has increased. In the classes which this legislation does not effect, there has been a great improvement. The upper classes were at one time convivial in the extreme. I heard when I first came to the counties stories of the conviviality at the dinners of the clergy and of the farmers. They used to begin at three in the afternoon and continue till three the next morning, and the consumption of whisky for each individual would be a bottle! Such things are now almost unknown, and the improvement has been voluntary. A similar improvement has taken place in the fisher population, entirely of their own motion, and the sooner the misguided friends of temperance learn that working men may be led, but will not be driven, the sooner there will be marked improvement.

So far as religious matters went, the population was divided widely. In the towns there were a few Roman Catholics who had immigrated from elsewhere. With the exception of a few of the more remote Western valleys, the old Roman Catholic population had died out. The people were of various forms of Protestantism, mostly Presbyterian. There had, at one time, been a considerable number of the Society of Friends brought by the "Barclay" of Ury, of whom Whittier has so beautifully sung. The fisher population have the peculiarity that a large number of them adhere to the Episcopalian Church.

When I first went to the district, my work was small. In point of fact, I had been appointed to what was almost a sinecure. My predecessor, the brother of a Court of Session judge, who had an Edinburgh reputation for wit, was also somewhat of a character and was anxious to appear as if he were fully occupied. There was really only one day's work in the week for anyone, but he liked to have something to do every day, and accordingly each case, even though quite small, was allowed four days for proof—two for the claimant and two for the respondent. My first business was to remedy this state of matters and I remember that the solicitors thought they had got a very strict person to deal with, when, as a first measure, I told them, they would have to be content with one day for each side. They were, however, reasonable people, and seeing the advantage of expedition, we were soon able to get through our work quite as well as courts of higher pretensions. This paucity of work had important advantages for me. It allowed me abundance of time for physical exercise and the time I could give to fishing and shooting had the effect of restoring my

health. It also allowed me to become well acquainted with the work as well as to do some legal writing over and above my routine duties. Although I had gathered a fair knowledge of some branches of law, it was not systematic. There were branches of which I knew a good deal and others of which I knew little. I set myself to acquire as thorough a knowledge as I could of the whole law which could come before my Court. Whenever a point occurred I read the whole law concerning it, not only the cases cited to me, but the far more numerous cases which were not cited. In short, I read all the authorities bearing upon the branch of the law in which the point occurred, and afterwards, when actual judicial business left me without time for this, I found the benefit of it. I do not think I was by any means the first judge to learn most of his law after he got to the bench, but I knew that after I was a judge I had a great deal to learn and that I learned it.

During these early years I published two law books of considerable size. I was so impressed with the value of codification that in all I did I had an eye ultimately to it. My first task was to edit and almost re-write a large treatise on the law of Bills of Exchange. Judging from what happened in Germany and other foreign countries, I surmised that the Law of Bills would be the first to be codified, and in this surmise I turned out to be right. Next I thought, judging from similar experiences, that the Law of Process would also be an early department for codification, and in order to learn the process of my own courts thoroughly, I wrote a treatise on it, arranging it, as I best could, in the shape that I thought a code might possibly take. I found the practice of writing beneficial, and I found the book on process useful in many ways, though hardly in the way I had intended. It got popular with practitioners and sold in such quantities that, in time, it went through four editions. The attempt to make it a foundation for a code failed. I wrote and published in a leading Scottish Law magazine an article suggesting that a code of process for our local courts should be made, indicating thereby my willingness to help, but no one took notice of the proposal. The solicitors, for whose benefit I meant it, did not take up the idea, and those who had the power to carry it out—the leading lawyers of Edinburgh—having no pressure put on them, naturally did nothing.

My new position reconciled me to the law. It was probably the humblest judicial position in Great Britain, but then it was judicial. I had no longer to hang about the Supreme Courts wearying for practice which I never expected and should probably have hated if I got it. I had got at a very early age into the magistrature, and

that, too, might serve for a career. It was one on the continent and I would see whether it might not be made one in this country, and for a pioneer I had afterwards a fair success. Then what was more important, I found I could now like and respect my profession. In reading law, I was no longer haunted by the fear that I might have to keep back or color something lest I should injure a client. Whatever I believed to be law, I could boldly speak out, caring for nobody. The very hunt through all the obscure sources of the law had something of the pleasure of a scientific or archaeological investigation, and in the mere doing, or attempting to do justice, there was a profound satisfaction. I doubt if any judge ever took more pains than I did to arrive at a right conclusion. Sometimes, when I could not make up my mind, I would write a judgment on each side and compare the two. All this was laborious, but it brought mental contentment, and I had no longer to ask, as Horace asked Maccenas :

Qui fit ut nemo quam sibi sortem  
Sen ratio dederit sen fors objecerit, illa  
Contentus vivat, laudet diversa sequentes?

The northern district of my jurisdiction was added by an Act of Parliament passed in 1870 by the present Lord Young, then Lord Advocate. It made a very large increase in the quantity of my work. In so far as regarded the country districts, the work was of the same character, but the city of Aberdeen, having a large harbor and a large trade, brought me much commercial law.

My going to Aberdeen required a considerable addition to be made to the court accommodation there, and I remember an amusing little discussion connected with that. One of the old Court Houses which had to come down to make room for the new, had a Latin motto upon it: "*Servate terminos quos patres vestri posuere.*" The colleague with whom I found I was to be associated in Aberdeen, being a bit of a radical, and thought this too conservative, being himself unable to suggest anything better, he applied to me. I suggested putting up some warning to litigants, and what would he think of "*vae victis, et victoribus?*" He said he did not want a motto invented by me; he wanted something sanctioned by the wisdom of ages. I then suggested going to some of the ancient brocards and from them I gave him the choice of two. How would "*Curia pauperibus clausa est*" suit? He was still dissatisfied, and I suggested, as being even, at the present day, in many cases true: "*Curia noscit legem.*" This left him still unhappy, and the Court House to this day is without its motto.

When I got to Aberdeen, I found my time fully employed. The shooting and fishing had to be stopped and an occasional game at golf had to suffice for exercise. The routine of work was, as a rule, somewhat monotonous. One day in the week had to be given to holding Circuit Courts through the counties, and another in the city to courts for small causes, under £12 in value. The remaining four days, and I often had to sit on all of them, were occupied on heavy cases. These took a wide range and varied in value from the higher limit of the Summary Court up to any amount, though it was rare to have them over £400 or £500, cases involving more serious amounts being usually taken to a Lord Ordinary in the Court of Session who had a concurrent jurisdiction. The cases were of every possible kind. In commercial law there were actions for every kind of specific implement, and for specified payments under contract and for damages for breach. In shipping, every kind of claim was competent, there being so extensive an admiralty jurisdiction that one of my more distant colleagues, who presided over a group of isles, thought himself entitled to don an admiral's uniform. Then actions of damages for every kind of wrong, from breach of promise upwards, were competent, and of course numerous. All these actions were tried upon a record which had to disclose fairly the nature of the claim and of the defence. They were tried without juries, and the evidence was recorded in my early days by the hand of the judge, and afterwards by shorthand writers. There were no juries in civil causes, except where lands had been taken under statutory authority, and their value had to be fixed. These were of rare occurrence. The cases were usually conducted by solicitors, though barristers, even of the highest standing, sometimes appeared. The most of the cases were more or less of a kind which raised questions of fact and had witnesses, but there were many cases also, particularly as to rights of succession, which turned on the construction of wills and other documents, which were settled without witnesses.

I took also an active share in legal work outside of my professional duties. I had written pretty extensively upon the subject of codification and on more than one occasion I was invited by some Chamber of Commerce to take part in discussion on it. On the invitation of the Aberdeen Chamber, I moved and carried at a meeting of the Chambers of Commerce of the United Kingdom, held at Wolverhampton, a proposal in favor of a commercial code for the United Kingdom, and at a subsequent meeting of the Chambers of Commerce of the Empire, I moved on the invitation of the London Chamber a resolution in favor of an Imperial Commercial Code.

which again was carried unanimously. In consequence, partly of these things, I was invited to take part in the formation of one of the first of the codes. The first part to be codified was, as I had expected, the Law of Bills of Exchange. The English Committee which had charge of it, under Lord Herschell, had caused it to be drawn, adapted exclusively to England. If it had been carried to this form, it would have been fatal to any general code, and it was necessary to have it put into such a shape as would make it suit the United Kingdom. I accordingly put myself in communication with the chairman of the committee and offered my assistance as being the editor or author of the Standard Scottish Treatise on Bills. After a little correspondence, I was invited to suggest the alterations required to adapt it to the United Kingdom. These were numerous, but mostly verbal. They consisted mainly of the deletion of English technical law terms, and the substitution for them of ordinary English words. The draftsman in charge of the Bill, a man of great ability, warmly took up my suggestion and the result was that the Code of Bills passed in its present form. In an article written by him, and published in the *Bankers' Magazine* at the time, my share was handsomely acknowledged.

The adapting of the Bills' Code to make it suit the British Islands brought it into such form that, with few alterations, it could be adopted by the colonies. It has now, I think, been adopted throughout the whole British Empire and it has even served as a model for some of the States in America. When the few farther parts of the Commercial Code were drawn, the draftsman put them at once into a similar shape, and I had no occasion again to intervene except possibly with some small suggestion. I may mention that I also attended, along with Sir John Gorst and others, the Congress called by the King of Belgium to meet in Antwerp to consider a project for having a Bills' Code for Europe. It was largely attended and such a code was drawn. I made various suggestions for bringing it into harmony with the British Code, which were favorably viewed by the International Committee in charge of it, but the British Government refused its adhesion, and the King of Belgium had to drop the scheme.

During the whole of my time I gave a great amount of assistance in the drafting of bills which in any way concerned the local courts. There had been scandalous delays in all the courts and a mischievous system of deciding cases upon mere points of form. A vigorous attack was made on the Courts by one of the judges, Lord Ormidale, and in consequence of it there was a commission of inquiry, and for a dozen years or so there was a particularly

active time of law reform. John Ferguson Mathewson was appointed by Lord Young draftsman of Scottish bills, and began with sound ideas about codification. Unfortunately, Lord Young retired to the Bench, and his successors had neither his courage nor ability, and the movement became one of mere cobbling, though it is true, of cobbling on a pretty extensive scale. Had I been free to act, I should have declined to have anything to do with it, but I was a public official, and my writings had made me be regarded as the leading authority upon local court practice. I could not stand aloof and I accordingly gave my services freely. They were always welcomed, and I do not think there was one of the many bills which did not bear many marks of my influence.

Another question on which I took a great interest was the abolition of imprisonment for debt in Scotland. Imprisonment for small debts, under the old sum of £100 Scots or £8 6. 8. Sterling, had long been abolished. But there remained a system of imprisonment for larger debts. That system had never been anything like so bad as the system in England. Imprisonment for indefinite periods, such as Dickens described as having taken place in Marshalsea Prison, never was permitted in Scotland. When we adopted the Roman Law, we adopted their system of "*Cessio Bonorum*," under which nobody could be imprisoned for longer than two months, unless guilty of fraud. If the debtor had not been guilty of fraud and had made a fair surrender of his property to his creditors, a Court of Law had the power of liberating him after a short detention. I only remember one case of a debtor being detained for a long time—nearly a year, I think, in prison. He was given to drinking and took the notion that if he were kept in prison where he could get no strong liquor without the surgeon's order he would get over the bad habit. He accordingly declined to sign the deed surrendering his effects to his creditors and remained quietly in prison. It was one of the best cures for dipsomania. For years after he got out, I remember him, a very decent waiter, remaining sober, but his trade was a bad one for him, and ultimately, I am afraid, he fell back into his old habits.

There was naturally a great discussion over the abolition of imprisonment for debt. Sir Charles Cameron was chairman of the Commission, and I, at his request, gave evidence before it more than once and helped him with references of foreign laws where similar imprisonment had already been abolished. The result of the effort was that imprisonment for mere debt in Scotland was abolished completely, far more completely than in England, where the vicious system of imprisonment for small debts—it is hardly practicable for



large—remains to an extent which can hardly be credited. In England, last year, over 11,000 persons were committed to prison for debt by the County Court judges, and what is worse is that the number seems annually to be increasing. And it is certain that in nearly every one of the cases it would have been for the public good that no credit should have been given.

The complete abolition in Scotland caused some disappointment, particularly among the lowest ranks of the legal profession, who found their power of extorting money from the unfortunate considerably diminished. Now and then a weak effort has been made to restore imprisonment for debt. The comment of an American lawyer who said that they might just as well try to restore the torture chamber set a proper value on these efforts from which nothing has, or ever will come.

When I had been close on thirty years carrying on this varied work I began to have thoughts of retiring. In regard to possible promotion I found myself in a peculiar position. I was in a sort of a *cul de sac*. I had got into office from which, if I wanted to be promoted, I had to begin by going down. I gained no accession of rank by coming to Aberdeen, but I had got into the foremost line of my class and if I wanted promotion I had to begin on the lowest line of the next highest rank. This involved two sacrifices. I would have had to accept a lower salary—lower, indeed, than my then earned retiring allowance—and I would have had to try to make up for the lost income by giving up my purely judicial *status* and becoming again a candidate for practice. This I would not do. After my former experience of practice I had no faith in my power of attracting it. I indicated to the Crown authorities my willingness to accept an appointment of equal value, but this, although it would have saved the public the amount of my retiring allowance, was refused. This was characteristic of my luck. In the course of my life I have asked for some things and I have got some things, but the things I asked for I never got, and the things I got came to me without asking. In the present case, I had no reason afterwards to regret the refusal. Several of my junior brethren were found willing to make the venture, which I declined, and some who made it had a certain amount of success for a while, but I have not heard that any of them met with a lasting success.

What ultimately decided me to retire was an increase which was made, not in the amount of my work, but in the inconvenience with which it was discharged. In the Circuit Courts which I had to take, litigants had the choice of bringing their cases either to the Circuit Court or to Aberdeen, and the heaviest cases were always taken at

headquarters. The leading Circuit happened to be held in one of the burghs which returned one of the two Scottish Law officers to Parliament, and the law agents there prevailed upon him to take steps with his colleague to make it compulsory to take all the work of the district there. This was attended by great hardship to me and was, also, I thought, detrimental to the public. But as the law officers of the Crown had the power of making regulations on the subject, it was useless for me to say much against it, and I accordingly allowed it to pass. I had earned my pension and I determined that, if I found the new way of carrying on the business interfered with my health, I would retire. It had that effect in a comparatively short time. I gave the system a fair trial. When I first felt it affecting my health, I consulted my medical adviser, and by his advice tried a sea voyage and two months' rest. In this holiday I made my first visit to America, with which subsequently I had so many pleasant relations. This kept me right for a year or two longer, but ultimately it became plain that the long days in the Circuit Courts which the new system involved, added to the wearisome journey there and back, were more than my health would tolerate, and, as I had done a fair day's work for the state, I resolved to retire. I am bound to add that I do not think that either of the law officers had the slightest idea that I would find that what they did would be detrimental to my health. They had extravagant notions themselves of the amount of traveling to which a lawyer could, without injury, be subjected, and they, themselves, ultimately both broke down at comparatively early ages mainly in consequence of over-traveling.

When I went to my medical advisers about retiring, it was with the notion of retiring in about a year. To my surprise, I was told that if I could afford it, the sooner I retired, the better, and accordingly, in the beginning of 1890, after about forty years of law and about thirty of state service, I retired.

What happened with me after this has nothing to do with the work of a "judge ordinar," but those who have followed me up to this point may like to hear the rest of my story, and by way of completing it, I add a few words. About eighteen months after I retired from the judgeship there was a vacancy in the law professorship in the University of Aberdeen, and I was asked to accept the office. It was contemplated to do something to revive the law faculty which had fallen to a low ebb, from various causes—in no way, I may explain, attributable to fault on the part of my predecessor, who was a most amiable and learned man, but who had never had a fair chance. It was deemed useless to put a young man

into the office to do what was required. The governing body of the university fixed upon me as having the requisite legal experience. I accepted the duty and set to work to reorganize the law faculty, which required expansion. A commission was sitting at the time upon the Scotch universities, and when the proposals, drawn out by the University Court, with my assistance, went before them, it was agreed to add a chair of Conveyancing and that a new course of lectures on Roman Law should be established. I was bound, during the winter, to lecture on Scotch Law, and I volunteered to give a summer course upon the history of Roman Law. My knowledge of Roman Law having got possibly a little rusty during the forty years and more since I had left Berlin, I went to Leipsic for a short period to make myself acquainted with the most recent methods and literature. With the most obliging help of two very distinguished professors, Windscheid and Sohm, I accomplished that end, and came back with a small library of the best of the most recent books. The additions made to the Faculty on my suggestion gave it a minimum of completeness and enabled us, for the first time since the University was founded, to grant, after examination, a degree in law, namely the lowest, that of Bachelor. It was always a beginning. The way was also opened for further extension as soon as funds were available.

After I had held the office for about ten years and made the new scheme, I believe, a fair success, I retired. During my time the number of students, although never very great, in the end had trebled the previous numbers. After I retired, other funds have become available and further extensions have been made, and with good management the Faculty should continue to advance. I found the professorship a much more agreeable office than the judgeship. I was fortunate in my students, many of whom were graduates in arts and all of whom had come to the age when the desire for knowledge was most active. Attendance, moreover, was entirely optional. Nearly all were being educated to be solicitors, who, provided they satisfied their examiners, could get their knowledge where they pleased. As I had instituted the Roman Law class, I could arrange it as I liked, and I made an experiment which was successful. All British teachers of whatever kind and degree have the prize system on the brain. No pupil, male or female, junior or advanced, ever learned anything, simply because he wants to know, and because the thing is worth knowing. From year's end to year's end, from morn to night, it is a whirl of competitions, learning because he has to take a prize, or at least a place, in some examination. I determined to see if Roman Law could not be taught free from this stress

and strain, and as a mere matter of intellectual pleasure. In this I was completely successful, and I know no greater pleasure than that of expounding history or principles to a set of intelligent lads, whose attention never flags. It is to me partly amusing, partly pathetic, to have to add that no sooner was my back turned than, in order to keep green the memory of one who had broken down in his prime, the prize system was instituted in full force.

During my term of the professorship, I was honored by an invitation to Yale University to deliver the Storrs course of lectures on Municipal Law. I was told by the distinguished professor, Judge Baldwin, who intimated the appointment to me that the American students were anxious to know how we came to have Roman Law in Scotland, especially seeing that they had none, except in a covert way, in England. I was delighted to find anybody outside of Scotland who had curiosity to know that we had any laws at all and I complied with pleasure with the invitation. A more delightful experience I never had. It was charming to find the eager curiosity with which the American students attended to what was explained to them. I had sometimes from three to four hundred students listening attentively to my lectures and I explained to them, I hope, enough of the history of Scotch Law,—a dry enough subject in all conscience,—to let them know how it was that we had Roman Law. Nothing was more remarkable than the curiosity which they displayed. It seemed to me that there was nothing of an intellectual kind that they thought foreign to them. I could not help contrasting it with the attitude of the English on such a matter. If I had been rash enough to have offered to give such a course of lectures in England I would not have got a student to attend, unless I had paid him. I never enjoyed anything so much as this visit to Yale. The late Dean of the Law Faculty, Professor Wayland, so well known for his philanthropic labors, and Professor Baldwin, whose reputation extends freely to both sides of the Atlantic, and many others were hospitality itself, and the full view I got of the working of a great American University was a revelation to me. With one exception, the lectures were published—two of them in the *Yale Law Journal*, and the remainder in the *Scottish Juridical Review*.

The advantage which the professorship had over the judgeship was not only that the work was more interesting—so interesting, indeed, that much of it could be done for the mere pleasure of doing it, but that it was also much lighter in quantity. It left me with more leisure which I could employ partly for my own advantage, and sometimes I hope for the advantage of the public. Part of this

leisure was bestowed on work outside of my usual sphere and was spent in serving upon two Government commissions or departmental committees, as they were technically called, to inquire into the treatment of habitual offenders, of inebriates and juvenile offenders and some cognate matters. The first commission consisted of several eminent men, well-known in similar duties. Sir Charles Cameron, M.D., member of Parliament, was chairman. The present commissioner for prisons in Scotland, Lieutenant Colonel McHardy, the Right Honorable Robert Farquharson, Colonel Sir Colin Scott Moncrieff, under secretary for Scotland, were upon it and a well-known medical gentleman, Dr. Sutherland, made a most efficient secretary. Miss Flora Stephenson of Edinburgh, long chairman of the school board there, was the lady member. Our duties were to inquire whether the number of habitual and other offenders was increasing, and if it was, we were to try to discover the causes of the increase and to suggest remedies. This committee held a large number of sittings, examined a great many witnesses and visited some thirty or forty different places, where information could be got. Finally we presented a unanimous report. The information we got led to some conclusions which were hardly expected. We found that Scotland, where, be it said, there is a great deal of self-righteousness, was worse in many respects than England. The number of habitual offenders in Glasgow, for example, was something like four times the corresponding number in London. My own city, Aberdeen, was not one of the worse, but still it had an unenviably large proportion. In going more particularly into the matter, we found, however, that the increase was entirely in the number of petty offenders. It is difficult to draw any hard and fast line between heinous criminals and petty offenders. It had to be done roughly. In countries where attempts are made to be exact, as, for example, in Italy, where the seriousness of assaults is judged of by the length of time the injuries take to cure, the standard is by no means certain. But although the standard had to be a rough one, no doubt remained about the general result. Serious crime had largely diminished in England and Scotland, while in the case of petty offenders there had been an astonishingly large increase. This pointed to one result of a somewhat unsatisfactory kind. It showed that while the general conduct of the population in regard to crime must have improved, there had, nevertheless, been an increase in the number of petty convictions. This seemed to be due partly to increased severity in the way in which the law took notice of things as punishable, which, in former states of society—even half a century ago—would never have been heeded. It further

pointed to a large increase in the diligence or meddlesomeness of the police—officers being encouraged by some magistrates to apprehend for all sorts of trifling offences which, in other districts, would never be noticed. The remedy for this was plainly a more reasonable administration. Our greatest difficulty was what to do with inebriates. The folly of punishing such people by long or short terms of imprisonment was clear to every one, except some fanatics. When the inebriates were liberated, they were only more thirsty than usual and relapsed all the more quickly. Something different from imprisonment had to be tried, and we suggested reformatories for inebriates. We suggested also that something like what is known in America as the indeterminate sentence might be tried—dividing inebriates for this purpose into two classes, the more seriously criminal and the less seriously. We recommended, accordingly, two classes of reformatories—one for the more serious criminals to be kept up by the state and to be conducted very much as a prison, and another for the less serious, to be conducted by the local authorities and to be more on the analogy of a poorhouse, from which escape was prohibited them of a penal establishment. The first, the state reformatory, was set agoing not long after our report was finished, and has done good service. The other reformatories have not yet received a fair trial, although it is more than ten years since our report, and more than eight years since the requisite legislation followed it. Local authorities, when there is money to be spent, are slow to move. In connection with the reformatories, there was a careful scheme for licensing out, it being our view that, long before the legal term of detention—which was three years—expired, inebriates should be allowed out upon probation and encouraged to acquire self-control.

The first commission was followed by a second, composed of much the same members. In it we were asked to draw up regulations for the institutions where the habitual inebriate offenders were to be received. One of my duties for the use of both commissions was to draw up notes upon the state of the law actually in force before they were appointed. I drew up a tolerably lengthy document with full notes of the law on the subject both in Scotland and in England, and I also added many notes on the subject of foreign laws. I believe these notes were found of considerable use by the non-legal members of the commission.

The experience I gained of the possibility of curing inebriates was depressing. Such a thing as a radical cure of a male inebriate seemed to be rare, and of a female inebriate, to be impossible. The discharged inebriate seemed to be a mere house of cards liable to

fall down on yielding to the slightest temptation. The medical treatment in particular seemed to be very defective and its principles not to be understood. An inebriate seems to have a different constitution from other people. The weakness may be inherited or it may be acquired. Some young people, the children of weak—not necessarily of dissipated parents—seem to have it from the beginning, and I have known cases of youths, both male and female, where, from the very first, the person, if drink was tasted and there was the opportunity, never stopped until intoxicated. Even on a strong person, the result of frequent indulgence, especially in spirits, and more especially if used to stimulate exertion, is to produce a constitution of the same kind. It is this “dipsoidal” constitution which requires to be changed, or to have a diet provided for it, which will enable it to live in comfort. The problem is far from easy and seems beyond the ordinary medical practitioner. It would be worth the while of government to put it into the hands of a scientific commission where the members would not be restrained by antiquated notions of diet, and would not be afraid to test their recommendations by those experiments for which abundant opportunities could be afforded.

Another occupation which I found for my spare time while I was professor was one for which I am far from expecting unanimous approval. While I had been judge I had kept so carefully clear of politics that I think few people in the territory knew that I had any. But when I was set free from the restraints of office, I found a great controversy going on—the question whether we were to grant Home Rule for Ireland. Upon that question I took a strong view, contrary altogether to the proposed innovation, and for several years I took an active part in local politics. As chairman of the Unionist Associations of the constituency in which I resided, and of the University, and as a member of many other bodies holding the same views, I had what was unusual for me, a large amount of public speaking, where the opinion of the solicitors, who, long ago, had thought that I might develop into a “platform” speaker, received at least some support. I had the honor of being invited to stand for three constituencies in Parliament. I am bound to confess that, from the Unionist point of view, they were not eligible constituencies. Members of Parliament in Great Britain must either be wealthy men, or must be in some sense adventurers, and the best constituencies are offered to one or other of these classes. The bulk of the members of Parliament belong to the wealthy class. The class of what I hope I may call, without offence, adventurers, is a somewhat miscellaneous one. There are the political adventurers

on the hunt for places, the legal members on the hunt for promotion and the socialist members on the hunt for anything which they can render collective. I belonged to none of these sets, and accordingly the constituencies that were offered to me were not of a promising kind, and only one of them has as yet returned a Unionist member, and that for only a short time. I declined altogether to stand for Parliament. I was too old to change to a new profession and I had no inclination to leave an occupation which I liked, to go into one which I was pretty sure to dislike. I had no ambition to spend my time either wandering about the precincts of the House of Commons, wearying to get away, or in the House itself, listening to speeches usually of remarkable dreariness. At my age I could not hope for anything better, as no one acquires position in the British Parliament, unless he enters it young and can afford to wait his turn.

In these different ways I filled up the ten years during which I held the office of professorship. At the end of the ten years I had been so much weakened by different attacks of influenza which, though I had previously been robust enough, seemed to fix upon me and to leave me no rest so that I was obliged to retire. Since I retired, the state of my health has not permitted me to do much. The last thing I did of any interest was to take part in an important Criminal Law Congress held in 1902 in St. Petersburg. The Russian Government had resolved to revise its Criminal Procedure, and, as usual, it took the greatest pains in order to have its code drawn in the best form. There is no lack of good law in Russia. What is wanted there is a good administration. So long as what is called "the power of administrative exile" exists, it matters not how good the laws are. Apart from questions of religion and the autocracy, there is no better criminal code in the world than the Russian, but of what advantage is that, when a secretary of state can, without notice, and without any kind of trial, at once banish any person or what is the same thing, order him to transfer his residence from one part of Russia to another. This may not be called banishment, but its effect is exactly the same, and a man who falls under suspicion, will suddenly find himself obliged to change his residence from some opulent civilized Russian city to some distant place like Archangel or Tobolsk. The Russian Code of Criminal Procedure had, like most of their other codes, existed for a considerable time, but as it had become, on many points, antiquated, it was desired to amend it, and, in doing so, to have full information as to the procedure which existed elsewhere. Accordingly, a meeting of the International Criminalistic Association was arranged for in St.



Petersburg. Sir Howard Vincent attended, on the part of England, and I, likewise, by special invitation, attended for Scotland.

The other countries of Europe were more largely represented. From America, I did not observe any representative. The Congress held a large number of meetings in St. Petersburg, and one or two supplementary in Moscow. Sir Howard Vincent read a most interesting paper upon the English Procedure. His paper was the cause of so much discussion that no time was left to read my contribution. It was, however, printed in the Journal of the Society at Berlin and I have no doubt has done as much good and has received from those concerned as much attention as if it had been read. The breaking out of the Japanese War has delayed the completion of the Code of Criminal Procedure, but it is expected soon.

We received in St. Petersburg the most hospitable of receptions, which again was repeated in Moscow. Everything in Russia then looked peaceful, although it is only four years since. No one looking at the country then would have dreamed that it was on the eve of the trials and storms which have occurred. We came in contact with a good many of the upper class and with a large number of the middle class, and nothing could be better than the impression which the Russians made upon us. They were extremely friendly to us and yet to their own countries they were loyal and patriotic. With the lower orders we came, although to a small extent in contact, and nothing could improve the friendly civility with which everyone of them appeared to regard us.

My visit to Russia concluded with a visit to Warsaw, then also one of the most orderly and busy of cities. I hardly expected to find in Warsaw one of the finest hotels and theaters I had seen. I was struck by the numerous Jews one met on the streets, and particularly in one of the parks which seemed to be left altogether to them. But a stranger saw nothing to suggest that the Jews should, in the way in which they have done, have excited such a bitter feeling of hatred as the rest of the population seems to entertain for them. My visit to Russia, though comparatively short, was paid under great advantages for seeing it and its inhabitants. Since then I have followed its fortunes closely, and the prevailing impression has been one of deep sorrow that a people with so many attractive qualities should have been exposed to so many misfortunes.

*J. Dove Wilson.*